2018 WL 394890
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

MORRIS COUNTY MUNICIPAL JOINT INSURANCE FUND, as Subrogee FOR the BOROUGH OF MOUNT ARLINGTON, Plaintiff–Appellant,
v.
WATERSEDGE DESIGN GROUP, LLC, Defendant–Respondent.

DOCKET NO. A–5559–15T4
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Argued December 21, 2017
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Decided January 12, 2018

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L–2293–15.

Attorneys and Law Firms

Dawn M. Sullivan argued the cause for appellant (Dorsey & Semrau, LLC, attorneys; Fred M. Samrau and Dawn M. Sullivan, on the briefs).

Stuart M. Lederman argued the cause for respondent (Riker Danzig Scherer Hyland & Perretti LLP, attorneys; John M. Pellecchia, of counsel and on the brief; Cristin M. Boyle, on the brief).

Before Judges Simonelli, Haas and Gooden Brown.

Opinion

PER CURIAM

***1** Plaintiff Morris County Municipal Joint Insurance Fund (JIF) appeals from the June 20, 2016 Law Division order, granting the motion of defendant Watersedge Design Group, LLC's (Watersedge) motion to dismiss the complaint with prejudice pursuant to Rule 4:6–2(e), and denying JIF's cross-motion to amend the complaint. We affirm.

On September 30, 2013, Michael Blewett, a firefighter employed by the Borough of Mount Arlington (Borough), was injured while assisting in extinguishing a house fire on Watersedge's property. Blewett filed a workers' compensation claim through the Borough. JIF,[1] the Borough's insurance carrier, paid over $44,000 in workers' compensation benefits to Blewett.

On September 28, 2015, JIF, as subrogee for the Borough, filed a subrogation complaint against Watersedge for damages. In lieu of filing an answer, Watersedge filed a motion to dismiss pursuant to Rule 4:6–2(e) based on JIF's failure to comply with N.J.S.A. 34:15–40(f), which provides as follows, in pertinent part:

> Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein.
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> ....
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> (f) When an injured employee or his dependents fail within 1 year of the accident to either effect a settlement with the third person or his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, 10 days after a written demand on the injured employee or his dependents, can either effect a settlement with the third person or his insurance carrier or institute proceedings against the third person for the recovery of damages for the injuries and loss sustained by such injured employee or his dependents and any settlement made with the third person or his insurance carrier or proceedings had and taken by such employer or his insurance carrier against such third person, and such right of action shall be only for such right of action that the injured employee or his dependents would have had against the third person, and shall constitute a bar to any further claim or action by the injured employee or his dependents against the third person.... The legal action contemplated hereinabove shall be a civil action at law in the name of the injured employee or by the employer or insurance carrier in the name of the employee[.]
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> [(Emphasis added).]

Specifically, Watersedge argued that JIF failed to serve the ten-day written demand on Blewett prior to filing the complaint and did not file the action in Blewett's name.

JIF filed a cross-motion to amend the complaint to name itself as subrogee for Blewett and add Watersedge's principals and owners as defendants. JIF submitted Blewett's certification, dated April 18, 2016, wherein he stated he "waiv[ed his] right to file any claim or litigation against Watersedge" and "consent[ed] to [JIF] litigating this matter, through the subrogation process, in [his] name." Blewett did not state, and JIF provided no proof, that prior to the filing of the complaint and expiration of the two-year statute of limitations (SOL), [2] he was aware of his right to commence an action against Watersedge for damages and could waive that right and consent to JIF prosecuting an action in his name, and that such waiver would bar his personal injury claim against Watersedge. JIF conceded it did not contact Blewett prior to filing the complaint and did not serve the ten-day written demand.

***2** In a written opinion, Judge Stuart A. Minkowitz noted that N.J.S.A. 34:15–40 specifically created the right of subrogation, and the statute must be strictly enforced because it is a statutory right contrary to the common law and in derogation of the injured employee's rights. The judge found there was no dispute that JIF failed to serve the ten-day written demand on Blewett prior to filing the complaint, or that Blewett indicated he wished to waive his right to commence his own action against Watersedge and consented to JIF's prosecution of the action on his behalf after the filing of the complaint and expiration of the SOL.

Judge Minkowitz acknowledged that Blewett could waive the ten-day written demand requirement, but concluded JIF had to procure the waiver prior to instituting suit. The judge determined the deficiency could not be cured by procuring Blewett's waiver after the filing of the complaint and expiration of the SOL. The judge reasoned as follows:

> [Blewett] had an expressed statutory right to "commence[ ] [an action at law] within [two] years next after the cause of such action shall have accrued...." [N.J.S.A.] 2A:14–2. Upon expiration of that period, [Blewett's] right to commence an action ceased to exist (subject to limited tolling exceptions that are not applicable nor raised here). [Ibid.] Thus, because a waiver is valid only when a party knowingly, intelligently and voluntarily foregoes an existing right, [McCue v. Silcox, 122 N.J.L. 12, 13–14 (E. & A. 1939)], here, by the time [Blewett] attempted to waive his right to commence an action on his own behalf, his right no longer existed. Without an existing right to relinquish, [JIF] could not have procured a valid waiver from [Blewett] after the expiration of the statute of limitations. Accordingly, [JIF] cannot now cure the ten-day written demand deficiency and Watersedge's motion to dismiss must be granted.

The judge entered an order on June 20, 2016, granting Watersedge's motion and denying JIF's cross-motion. [3]

On appeal, JIF contends Judge Minkowitz erred in ruling that Blewett could not waive the ten-day written notice requirement after the filing of the complaint and expiration of the SOL. We disagree.

"Motions to dismiss for failure to state a claim require the complaint be searched in depth and with liberality to determine if there is any 'cause of action [ ] suggested" by the facts.' " State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 467 (App. Div. 2015) (quoting Printing–Mart Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "The inquiry is limited to 'examining the legal sufficiency of the facts alleged on the face of the complaint.' " Ibid. "On appeal, review is plenary and we owe no deference to the trial judge's conclusions." Ibid. (citing Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). "Dismissal is the appropriate remedy where, [such as here,] the pleading does not establish a colorable claim and discovery would not develop one." Cherry Hill Mitsubishi, 439 N.J. Super. at 467 (citation omitted).

***3** N.J.S.A. 34:15–40(f) creates a right of subrogation that "does not arise and cannot be exercised by ... [the] workers' compensation insurance carrier until [ten] days after a written demand is made upon either the injured employee or his dependents to either effect a settlement or institute a proceeding against the third-party wrongdoer." Errickson v. Supermarkets Gen. Corp., 246 N.J. Super. 457, 464 (App. Div. 1991). Since "[t]his statutory right is contrary to the common law and in derogation of the employee's rights ... it must be strictly enforced." Ibid. (emphasis added). "In the absence of the requisite written

demand served upon either the injured employee or his dependents, neither the employer nor his insurance carrier has the right or power to institute proceedings against the third-party wrongdoer for either the injured employee's or his dependents' injuries and loss." Ibid. Because JIF did not serve the ten-day written demand on Blewett, it had no right to institute suit against Watersedge for Blewett's injuries and loss. Ibid. However, that does not end our inquiry.

An injured employee can waive the ten-day written demand requirement. Id. at 465. For the waiver to be valid, there must be evidence that prior to instituting suit, the insurance carrier apprised the injured employee of his right to institute his own action, the carrier's right and intention to do so if he failed to proceed, and the relative rights of each party with respect to any such action. Poetz v. Mix, 7 N.J. 436, 448–49 (1951). In addition, a waiver must be "a voluntary and intentional relinquishment or abandonment of a known existing legal right ... which except for such waiver the party would have enjoyed[.]" Van Allen v. Bd. of Comm'rs, 211 N.J. Super. 407, 410 (App. Div. 1986) (emphasis added) (citations omitted).

Further, N.J.S.A. 34:15–40(f) does not create a new right, but extends the existing right of the injured employee to the employer or his insurance carrier under the circumstances outlined in the statute. "[S]uch right of action shall be only for such right of action that the injured employee or his dependents would have had against the third person[.]" N.J.S.A. 34:15–40(f). The employer or his insurance carrier would be subject to the same defenses as were available against the injured employee, including the SOL.

Here, there is no evidence that prior to filing the complaint, JIF never contacted Blewett to advise him of his rights or the effect of a waiver on his rights. Thus, Blewett's purported after-the-fact waiver was not valid. In addition, because Blewett was not aware of his rights prior to the filing of the complaint and expiration of the SOL, he could not voluntarily and intentionally waive them thereafter. Lastly, by the time JIF contacted Blewett and Blewett attempted to waive his rights, the SOL had long-expired, leaving him with no existing legal right of action against Watersedge and its principals.

The unpublished opinion in Hartford Underwriters Insurance Co. v. Salimente, No. A–3687–14 (App. Div. Feb. 6, 2017), on which JIF relies, does not change this result. Unpublished opinions do not constitute precedent or bind us. Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); R. 1:36–3. Nevertheless, the case is distinguishable.

In Hartford Underwriters, the insurance carrier failed to comply with the ten-day written demand requirement of N.J.S.A. 34:15–40(f) prior to filing a complaint the day before the SOL expired. Id. at 2. However, there was evidence that the carrier twice contacted the injured employee by letter prior to filing the complaint, advising him of his rights and inquiring as to whether he intended to bring an action himself. Id. at 3. Based on this evidence, we determined that the trial court improperly granted summary judgment on the waiver issue. Id. at 4. In contrast, there is no evidence that JIF contacted Blewett prior to the fling of the complaint or expiration of the SOL, advising him of his rights and inquiring as to whether he intended to bring an action on his own. Accordingly, the complaint was properly dismissed with prejudice.

***4** For the first time on appeal, JIF contends that equity and fairness support reversal. Generally, we decline to address issues not raised before the trial court, where, as here, they are not jurisdictional in nature and do not substantially implicate the public interest. Zaman v. Felton, 219 N.J. 199 226–27 (2014). Nevertheless, we will address this meritless contention for the sake of completeness.

As we have held,

> [e]quity will generally conform to established rules and precedents, and will not change or unsettle rights that are created and defined by existing legal principles. This is the basis for the equitable maxium "equity follows the law," which instructs that as a rule a court of equity will follow the legislative and common-law regulations of rights, and also obligations of contract.
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> [Borough of Seaside Park v. Comm'r of N.J. Dep't of Educ., 432 N.J. Super. 167, 222 (App. Div. 2013) (quoting Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 183 (1985)).]

Although subrogation is a device of equity, equity does not allow JIF to evade the mandatory requirements in N.J.S.A. 34:15–40(f).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2018 WL 394890

Footnotes

1 JIF is a public entity, non-profit, self-insured insurance fund created pursuant to N.J.S.A. 40A:10–36.

2 N.J.S.A. 2A:14–2(a).

3 Judge Minkowitz entered an order on August 5, 2016, denying JIF's motion for reconsideration. JIF's notice of appeal states it is only appealing from the June 20, 2016 order. "[I]t is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review." Pressler & Verniero, Current N.J. Court Rules, cmt. 6 on R. 2:5–1(f)(1) (2018); see 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004). In addition, JIF did not address the denial of the motion for reconsideration in its merits brief. The issue, therefore, is deemed waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6–2 (2018).